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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of SUSAN and DARBY CALWELL. SUSAN CALWELL, Appellant, v. DARBY CALWELL, Respondent.	G040988 (Super. Ct. No. 05D009353) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Linda Lancet Miller, Judge. Affirmed.

Law Offices of Cottle & Keen and Bertrand E. Cottle for Appellant.

Lorrie A. Walton for Respondent.

Susan Calwell appeals from an order denying her claim of exemption as to funds in her bank account. Her former husband, Darby Calwell,[1] sought to levy upon the account to satisfy the judgment dividing their community property and ordering Susan to make an equalizing payment to him. Susan contends the funds were exempt from levy because she had withdrawn them from a "401k" private retirement account that had been awarded to her in the dissolution. We conclude Susan failed to establish the funds were exempt and affirm the order.

FACTS

A stipulated judgment on reserved issues in the dissolution of Susan's and Darby's marriage was entered on May 28, 2008. Darby assumed primary physical responsibility for their two minor children, and Susan was to pay Darby $2,000 a month in spousal support (based on her 2005 annual income of $268,547 and Darby's of $19,000). In the community property division, Susan received the family residence and all interest in a 401k retirement account through her former employment with Chicago Title. Susan agreed she would buy out Darby's interest in the 401k retirement account by making an equalizing payment to Darby of $86,000 (which covered his interest in the 401k account and other community property as well), on or before June 5, 2008. Needless to say, Susan did not pay Darby, and he proceeded to enforce the judgment.

On July 16, 2008, Darby obtained a writ of execution for $86,163 and on July 29, 2008, the Orange County Sheriff served a notice of levy upon accounts in Susan's name at Washington Mutual Bank. Susan filed a claim of exemption from levy stating all funds, $55,644, held in a specific Washington Mutual Bank account were exempt under Code of Civil Procedure section 704.115[2] because the funds could be traced to the 401k account.

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[1] "Hereafter, we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. [Citation.]" (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

[2] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Susan's claim of exemption was accompanied by her declaration (and no other documents). She stated that after agreeing to the terms of the judgment, she suffered "substantial changes in all aspects of the reserved issues, including [her] financial status." Between December 2007 and February 2008 her "financial condition took a substantial downturn, and [she] found it necessary to access those retirement funds held in the Chicago Title 401k Retirement. The funds remained in my [Washington Mutual account] while I decided how best to reinvest the[m] until" they were levied upon. Susan also stated that in view of her "present poor financial condition, the amounts held under the levy should be determined to be exempt based upon the needs of . . . me and my family."

The trial court denied the claim of exemption. It rejected Susan's argument that because the funds in the Washington Mutual account could be traced to the 401k account, they necessarily retained their exempt status as retirement funds. The court observed Susan did not withdraw the funds for retirement purposes (she was not at retirement age), but had withdrawn the funds to use as ordinary income for her ordinary living expenses.

DISCUSSION

Susan contends the trial court erred by denying her claim of exemption. She argues that because the funds in her Washington Mutual account came from her 401k account, they were exempt from levy under section 704.115. We find no error.

"Orders granting or denying a claim of exemption are appealable. (. . . § 703.600.) A judgment or order of the trial court is presumed correct, and must be upheld if it is supported by substantial evidence, no matter how slight it may be. [Citation.] Further, all evidence must be viewed in the light most favorable to the prevailing party, and all conflicts in evidence or in inferences must be resolved in favor of upholding the trial court's judgment or order. [Citations.] Where sufficiency of the evidence is questioned, the duty of an appellate court begins and ends with a determination that there is in the record evidence legally sufficient to support the judgment or order. [Citation.] Where there is no conflict in the evidence, or an issue is presented on appeal upon undisputed facts, the appellate court is free to draw its own conclusions of law. [Citation.]" (*Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 626 (*Schwartzman*).)

Section 704.115, subdivision (b), provides in pertinent part, "All amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt" from enforcement of money judgments. "The burden of proof is on the judgment debtor to establish his right to the exemption. [Citations.]" (*Carter v. Carter* (1942) 55 Cal.App.2d 13, 14; *Perfection Paint Products v. Johnson* (1958) 164 Cal.App.2d 739, 741.)

"The purpose of the section 704.115 exemption for the corpus of private retirement plans is to safeguard a stream of income for retirees at the expense of bankruptcy creditors." (*In re MacIntyre* (9th Cir. 1996) 74 F.3d 186, 188.) As relevant here, section 703.100, subdivision (a)(1), provides the court is to make the determination of whether property is exempt under the circumstances existing at the time of levy on the property.

Section 703.080, the tracing statute, provides in pertinent part, "(a) Subject to any limitation provided in the particular exemption, a fund that is exempt remains exempt to the extent that it can be traced into deposit accounts or in the form of cash or its equivalent. [¶] (b) The exemption claimant has the burden of tracing an exempt fund."

Susan contends that because the funds in her Washington Mutual Bank account were the funds she withdrew from her 401k account upon termination of her employment, they were exempt from Darby's efforts to enforce his judgment on the equalizing payment she owed him. We assume for purposes of our discussion that when the funds were in the 401k account, they were indeed exempt from levy under section 704.115.[3]

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[3] We note the equalizing payment Susan failed to pay, and Darby is attempting to enforce, covered his community property interest in the very private retirement fund Susan claims is exempt from his notice of levy. Because we agree with the trial court that

The issue is whether when Susan withdrew the funds and deposited them into her regular bank account to use for non-retirement purposes, they retained their exempt status.

Susan relies on *McMullen v. Haycock* (2007) 147 Cal.App.4th 753 (*McMullen*) to support the essential gist of her argument—that if the funds were ever exempt from levy, they are always exempt from levy so long as they can be traced to an exempt source. In *McMullen*, the judgment debtor, upon retiring, rolled over the funds from his employer sponsored private retirement account into an Individual Retirement Account (IRA). While funds in a private retirement account are fully exempt from levy (§ 704.115, subd. (b)), IRA funds are exempt only to the extent "necessary to provide for the support of the judgment debtor" upon retirement (§ 704.115, subd. (e)). The judgment creditor contended the originally fully exempt funds lost that status upon being rolled over into an IRA and became subject to the exemption limitations imposed on IRAs. The court disagreed and held the retirement funds retained their fully exempt status regardless of the kind of account they were deposited into. (*Id.* at p. 760.)

But in *McMullen*, the private retirement funds were distributed to the judgment debtor upon his retirement, and rolled over into another retirement account for retirement purposes. Here, Susan is not a retiree and the funds were not rolled over into another account for retirement purposes. We comment here on the factual misrepresentations made by Susan in her appellant's brief in her effort to make this case more like *McMullen* and less like the one the trial court heard. Susan states repeatedly the funds from her 401k account were simply being held in her regular bank account with the "intent to role-over [*sic*] the funds into a similar or like kind retirement fund. There is no evidence [she] sought to merely take the fund contrary to its intended (exempt) purpose. . . . [¶] [She] merely sought to convert the funds to a self[-]administered plan or trust." But that is not what Susan asserted below. In her declaration, she stated that

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Susan failed to demonstrate the funds remained exempt after her withdrawal of them for non-retirement purposes, we need not consider whether Darby could nonetheless reach them on an equitable theory such as constructive trust.

sometime before February 2008, she withdrew the funds from her 401k account because she had suffered a "substantial downturn" in her "financial condition" and the funds were necessary to meet "the needs of . . . me and my family." By late July 2008, Darby's notice of levy was served, far past the usual 60-day time period for rolling over retirement funds into another appropriate retirement account so as to avoid the substantial tax penalties associated with an early withdrawal. (See 26 U.S.C. § 402(c)(3).) But the funds were not rolled over into another retirement account such as an IRA, and instead remained on hand for Susan to access and use for her ordinary living expenses. In view of Susan's statements in her declaration and the passage of time, the evidence supports the trial court's conclusion Susan withdrew the money to use for ordinary living expenses. She did not declare or provide any evidence suggesting she intended to continue maintaining the funds for retirement purposes.

The funds in Susan's bank account were not exempt from levy because although they came from her private retirement account, they were no longer being held or used for retirement purposes. (See *Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 14 [dispositive inquiry is whether plan designed and used for retirement purposes].) There are no California cases dealing with the effect of non-retirement use of such funds in their exempt status, but federal bankruptcy cases are instructive: *In re Daniel* (9th Cir. 1985) 771 F.2d 1352, and *In re Bloom* (9th Cir. 1988) 839 F.2d 1376, both considered the effect of the current use of funds deposited by debtors into their retirement plans in determining if the funds were designed or used for retirement purposes so as to be exempt under section 704.115, and thus, from bankruptcy. (See *In re Simpson* (9th Cir. Feb. 23, 2009, No. 07-15626) ___ F.3d ___, ___ [2009 WL 426405] [California exemption law governs federal bankruptcy exemptions].) "[T]he inquiry seeks only to determine whether an asset that fits the definition of a private retirement plan should nonetheless be *excluded* from exemption because the debtor treats it as something other than a retirement asset. Thus, while the debtor's subjective intent cannot create an exemption, it may take one away. [Citation.]" (*In re Simpson, supra,* ___ F.3d at p. ___ [2009 WL at p. 5], italics added.)

In *Daniel,* debtor was employed by his own professional corporation, which had a pension and profit-sharing plan managed and controlled by debtor. Debtor took most of his interest in the plan out as an unsecured loan. Although he had agreed to repay the loan at 10 percent interest, when the loan became due, he rolled it over to another promissory note and never made any payments. Two weeks before debtor filed his bankruptcy petition, he caused his corporation to contribute all of its available cash to the plan. (*In re Daniel, supra,* 771 F.2d at p. 1354.) The *Daniel* court concluded the fund was not exempt under the predecessor to section 704.115 (containing similar provisions) because the fund was not used by debtor principally for retirement purposes. (*In re Daniel, supra,* 771 F.2d at p. 1357.) "[T]he plan essentially operated to meet debtor's short-term personal needs by lending money or shielding and hiding funds from creditors. Moreover, the debtor has failed to show how his transactions with the plan, by virtue of his role as trustee, were in furtherance of legitimate long-term retirement purposes." (*Id.* at p. 1358.) Thus, "the lower courts were amply justified in finding that the debtor's plan was not principally 'used for retirement purposes [.]'" (*Id.* at pp. 1357-1358.)

By contrast, in *In re Bloom, supra,* 839 F.2d 1376, debtor had also taken substantial loans from her private retirement and profit-sharing plans. She made interest payments on the loans, but had not repaid any principal prior to filing for bankruptcy. Nonetheless, the court concluded debtor's "plans were not so abused as to lose their retirement purpose[,]" based on four facts: debtor followed the procedures set out in her retirement plan for taking loans, she charged and paid herself reasonable interest on the loans so they in fact appeared to be loans, not just early withdrawals, and there was no indication debtor tried to hide ineligible assets in her retirement plan. In short, the debtor in *Bloom* did not cease to treat her plan as a retirement plan and thus it was exempt under section 704.115. (*Id.* at p. 1379.)

The above cases support the trial court's conclusion here that when Susan withdrew her funds from her 401k account, and deposited the funds into her regular bank account to have available to meet her ordinary living expenses, the funds were no longer principally retirement funds. Susan bore the burden of demonstrating the funds were exempt. Other than stating the origin of the money was her now terminated 401k account with her former employer, she presented no evidence supporting a conclusion they remained funds intended for retirement purposes. Susan did not demonstrate she took the funds as a properly documented loan or hardship withdrawal from her 401k account, both of which might have suggested she intended to replenish the retirement funds at some later date. She simply withdrew the funds upon termination of her employment to address her current short-term financial needs. Thus, the court's conclusion the funds in Susan's regular bank account were not exempt from levy is supported by substantial evidence and cannot be disturbed.

DISPOSITION

The order is affirmed. Respondent is awarded his costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.